Alaska Native Corporations, for example, were created pursuant to an act of Congress as part of the political settlement of long-standing aboriginal disputes in the Alaska Native Claims Settlement Act of 1971 ("ANCSA"). As a result, they are unlike any private corporation. CIRI, for example, is in essence a federally compelled aggregation of 6,700 Alaskan Natives, who have been forced to deposit their aboriginal lands and assets in a "corporation." Recognizing the Native Corporation's unique and close relationship to its owners, Congress made Native Americans' ownership rights inalienable and subject to various restrictions by Federal Law. 43 U.S.C. § 1601, et seq. The effect, recognized by Congress, by the SBA, and by this Commission, has been greatly to restrict CIRI's financial powers and opportunities. See Fifth Memorandum Opinion and Order, 10 FCC Rcd at 428.

In this context, we believe that the Commission's narrowly tailored Tribal Affiliation rules would pass even strict scrutiny. Similarly, we believe the bidding credits accorded to CIRI and other Native Corporations and Tribes would survive review under "strict scrutiny." In Adarand, the Court did not strike down any statute, rule or regulation. It merely required that racial preferences be subjected to "strict scrutiny." But the point is legally irrelevant. Under settled law, regulations specifically aimed at Native Corporations and Tribes are simply not racial and are not subject to "[t]raditional equal protection analysis," regardless of the standard of review. United States v. Decker, 600 F.2d 733, 740 (9th Cir. 1979); Morton v. Mancari, 417 U.S. 535 (1974); United States v. Antelope, supra.

As the Court in Adarand carefully and repeatedly pointed out, equal protection requires strict scrutiny only for preferential treatment based on race. Even within the category of "race," Justice O'Connor's opinion in Adarand made clear that the Court was articulating only a "general rule" which did not affect certain political powers of government, such as the enumerated federal power over immigration. Adarand at 15 (citing Hampton v. Mow Sun Wong, 426 U.S. 88, 100, 101-02 n.21 (1976)). Further, Justice Stevens noted in his opinion that the Supreme Court has long recognized that Congress' special treatment of Native Corporations and Tribes is not based on race, but on their political status as quasi-sovereign entities. See Adarand Constructors, Inc. v. Pena, No. 93-1841, Stevens, J. dissenting, at 4 & n.3 (June 12, 1995). The Adarand majority, which found much to disagree with in Justice Stevens' opinion, did not and could not question this long established proposition.

III. THE TRIBAL AFFILIATION RULE IS AN INTEGRAL AND EXPRESS PART OF A COMPREHENSIVE SET OF RULES PRESCRIBED BY CONGRESS FOR NATIVE CORPORATIONS AND INDIAN TRIBES

The Tribal Affiliation Rule is a congressionally mandated and integral part of the Commission's comprehensive affiliation rules. This attribution rule for Native Corporations and Tribes is the only affiliation exception of its kind approved or required by

Congress. The argument that the exception for Native Corporations and Tribes is or should be analyzed in the same manner as exceptions for racial minorities is incorrect as a matter of constitutional, statutory, and regulatory law and policy.

The Commission's affiliation rules are not an incidental aspect of its size-based bidding scheme. As the Commission concluded, "Affiliation rules are an established and essential element in determining an applicant's compliance with a gross revenues (or other) size standard." Fifth Memorandum Opinion and Order, 10 FCC Rcd at 425.

Because such rules involve complex financial attribution and valuation issues outside the Commission's ordinary competence, the Commission logically looked to and borrowed extensively from the comprehensive affiliation rules established by the Small Business Administration. The Commission's "[a]doption of affiliation rules similar to those used by the SBA is a logical outgrowth of the Commission's decision to impose a gross revenues test for small businesses and to consider SBA's size standards in establishing that test." Id. at 424.

Adoption of the essential affiliation rules without an exception for Native Corporations and Tribes would be directly contrary to express congressional policy. As the Commission noted, "Congress has mandated that the SBA determine the size of a business concern owned by a tribe without regard to the concern's affiliation with the Indian tribe." Id. at 428 (emphasis added). Congressional intent could not be more clear. Congress specifically enacted a statute compelling the SBA to exclude the revenues and assets of any affiliated Native Corporation or Tribe. 15 U.S.C. § 636(j)(10)(J)(ii); see also 25 U.S.C. § 450b(e) (defining Indian Tribe as including "any Alaska Native village or regional . . . corporation" established pursuant to the ANCSA). As the Supreme Court has noted in other contexts, such an express statutory "exemption reveals a clear congressional recognition . . . of the unique legal status of tribal and reservation-based activities." Morton v. Mancari, 417 U.S. at 545-46.

Pursuant to this Congressional directive, the SBA adopted an affiliation exception for Native Corporations and Tribes. This Commission adopted the same Tribal Affiliation Rule, noting that this "mirrors this congressional mandate." Fifth Memorandum Opinion and Order, 10 FCC Rcd at 428. See also Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Order on Reconsideration, 9 FCC Rcd 4493, 4494 (1994) ("Order on Reconsideration") ("adoption of an affiliation exemption for Indian tribes and Alaska Native Corporations . . . is consistent with these other Federal policies").

Congress has chosen to regulate Native Corporations and Tribes by means of a complex set of rules. The Tribal Affiliation Rule is one integral piece of that set. In defining these entities and promoting the most basic policies underlying Congressional

treatment of Native Americans, Congress has spelled out a specific rule applicable only to Native Corporations and Tribes. Congress has recognized that not requiring a special affiliation rule applicable to Native Corporations and Tribes would treat these entities inequitably.

Finally, the "inequity" argument has been expressly and properly resolved by the Commission. As the Commission noted, when Congress created CIRI, it provided by statute that "the stock held by Native corporations is subject to strict alienability restrictions -- it cannot be sold, pledged, mortgaged or otherwise encumbered." Id. at 427-28. These restrictions have the effect, as the Commission properly found, of "preclud[ing]" Native Corporations "from two of the most important means of raising capital enjoyed by virtually every other corporation": pledging stock, and issuing new stock or debt securities. Id. at 428 (emphasis added). As the Commission noted, "Congress has not placed similar legal constraints on the assets and revenues of enterprises owned by any other minority group." Id. (emphasis added). Thus, the Commission properly found "that such legal restraints on assets and revenues place Indian tribes at a disadvantage vis-a-vis other minority groups with similar revenues and assets." Id. (emphasis added).

A recognition of the special disadvantages imposed on Native Corporations and Tribes by Congress, and the adoption of a Tribal Affiliation Rule specifically enacted by Congress, are required by the undisputed facts before this Commission and by express Congressional policy. Congress intended, in a domain uniquely within its power and discretion, to provide an exception for Indian Tribes and Corporations based on their unique character. We do not believe that any court would enjoin the Commission, even on a temporary basis, from maintaining an express statutory scheme which is not even subject to equal protection analysis. We are confident, on the other hand, that a failure to comply with this congressional policy would create a serious risk that the Commission would be enjoined.

IV. REMOVAL OF THE TRIBAL AFFILIATION RULE WOULD REQUIRE A RULE MAKING PROCEEDING

After lengthy rule making procedures, the Commission has properly adopted the Tribal Affiliation Rule previously adopted by the SBA pursuant to express Congressional mandate. The Commission cannot now reverse course and eliminate this Rule without appropriate rule making proceedings.

"[T]he APA expressly contemplates that notice and an opportunity to comment will be provided prior to agency decisions to repeal a rule." Consumer Energy Council of Am. v. F.E.R.C., 673 F.2d 425, 446 (D.C. Cir. 1982) (emphasis added), aff'd, 463 U.S. 1216 (1983); see also Citibank, Fed. Sav. Bank v. F.D.I.C., 836 F. Supp. 3, 7 (D.D.C. 1993) ("[N]otice and comment procedures which apply to the creation of new regulations are

equally applicable to the repeal of existing regulations"); Nat'l Wildlife Fed'n v. Watt, 571 F. Supp. 1145, 1156-58 (D.D.C. 1983) (noting that abandonment of regulation by agency based only on informal, ex parte opinions that provision was unconstitutional would violate APA notice and comment rules); 5 U.S.C. § 551(5) ("rule making" includes "repealing a rule").

Moreover, it is well established that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (emphasis added). This even greater "reasoned analysis" for rescinding a rule must be based on the record, after notice and opportunity to comment. Id. at 43-44. For the reasons noted below, we do not believe the Agency can meet this standard.

V. REMOVAL OF THE TRIBAL AFFILIATION RULE IS NOT AND CANNOT BE SUPPORTED BY THE RECORD

A. There is No Basis for a Departure from Express Congressional Policy Providing an Affiliation Exception Solely for Native Corporations and Tribes Based on their Unique Status

Moreover, nothing in the legal or factual framework relied upon by the Commission in adopting the Tribal Affiliation Rule has been changed since the Commission issued its order. The express constitutional provisions concerning congressional power in dealing with Indian Tribes, ANCSA, and the applicable Congressional enactment requiring a Tribal Affiliation exception from the SBA rules, all remain in place. The ANCSA restrictions on alienation which disadvantage Native Corporations vis-a-vis private corporations and other minority groups remain in place.

In adopting the SBA's tribal affiliation rules, the Commission did not rely on the affirmative action cases or policies which have been overruled by Adarand; those decisions, like Adarand itself, remain irrelevant to the Tribal Affiliation Rule.

The Commission adopted the Tribal Affiliation Rule prior to, and independently of, its subsequent adoption of an affiliation exception for minority groups. These two sets of rules were never linked, and given their independent congressional and constitutional foundations, cannot be linked. The possibility that the Commission will now eliminate the minority bidding credits in light of Adarand provides no rational basis for also eliminating the earlier, independent, congressionally-mandated Tribal Affiliation exception.

B. Removal of the Tribal Affiliation Rule Would Require Its Replacement with a Complex Set of Accounting Rules Addressing the Unique Financial Attributes of Native Corporations and Tribes

Native Corporations and Tribes are subject to highly complex, diverse and unique limitations on their assets and revenues. Many tribal lands are inalienable and/or held in trust by the federal government and/or are subject to federal regulation in a manner quite foreign to ordinary ownership. Federal law imposes similar restrictions on revenues. CIRI, just to mention one, is required by federal law to distribute most of its revenues from subsurface resources to other Native Corporations and to certain shareholders. See 43 U.S.C. § 1606(i) and (j). The accounting complexities for Tribal balance sheets (if they even exist) would be immense. Quite apart from the restrictions on the alienability of CIRI's stock, CIRI's assets and revenues, like those of other Native Corporations and Tribes, give CIRI far less financial power than superficially similar revenues and assets in the hands of private corporations.

Thus, even assuming that the congressional policy against attributing Native Corporation and Tribal assets and revenues to affiliated corporations were disregarded, any attempt to create attribution and valuation rules for Native Corporations and Tribes would involve complex accounting and legal issues and would take a substantial and de novo rule making effort. Attribution rules that did not take account of these diverse differences in the financial character of Native Corporations and Tribes would disadvantage Native Corporations and Tribes as compared to all other applicants and would be arbitrary and capricious.

VI. REMOVAL OF THE TRIBAL AFFILIATION RULE WOULD EXPOSE THE C BLOCK AUCTION TO THE SUBSTANTIAL RISK OF A PROLONGED STAY

A. Removal of the Tribal Affiliation Rules Would Violate The Principal Of LaRose and Expose The C Block Auction to a Stay

In borrowing heavily from the SBA affiliation rules, the Commission properly followed the guidance of LaRose v. F.C.C., 494 F.2d 1145, 1147 (D.C. Cir. 1974). See Order on Reconsideration, 9 FCC Rcd at 4494 n.11. Administrative agencies are "required to consider other federal policies, not unique to their particular . . . expertise, when fulfilling their mandate to assure that their regulatees operate in the public interest." LaRose, 494 F.2d at 1147 n.2. In LaRose, finding that the Commission had "fail[ed] to recognize the constraints imposed by appellant's status" under applicable bankruptcy law, the Court reversed the Commission's order. Id. at 1149-50; see also Storer Communications, Inc. v. F.C.C., 763 F.2d 436, 443 (the Commission "has a duty" to attempt to implement the

Communications Act "in a manner as consistent as possible with corporate and federal security laws' protection of shareholders' rights").

Any failure to "recognize the constraints imposed by" ANCSA and the express congressional policy of an attribution exception for Native Corporations and Tribes would be inconsistent with the lessons of LaRose and would subject the Commission's order to reversal. Litigation over this issue would not only be likely to be decided in CIRI's favor, it would create costs and delays which CIRI continues to join with the Commission in hoping to avoid.

B. Removal of the Tribal Affiliation Rule Would Constitute Overt and Unlawful Discrimination against Native Americans

Finally, eliminating the Tribal Affiliation Rule would not eliminate discrimination or create "neutral" rules or an "even" playing field. Such an action would in fact single out Alaska Natives and Native Americans for uniquely harsh treatment. It would result in the very sort of discrimination against Native Corporations and Tribes which Congress has expressly sought to avoid.

Under the current affiliation rules, for example, an unlimited number of wealthy persons (of any race) can combine their resources to form a single DE. As long as these persons avoid any corporate or legal relationship among themselves other than their participation in the DE, their combined assets, no matter how large, will not be aggregated to determine their eligibility to bid. In the absence of the Tribal Affiliation Rule, Alaskan Natives' assets would be aggregated artificially under the same Commission regulations and they would be forbidden even to participate in the auction. Without the Tribal Affiliation Rule, Alaska Native and Native American tribal members would be discriminated against because of the business structure imposed on them by Congress. Congress enacted the attribution rule to prevent just such results.